No. 12258

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

B. H. STAUFFER and STAUFFER SYSTEM, INC.,

Appellants,

vs.

KATHLEEN EXLEY,

Appellee.

PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED

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APPELLEE RESPECTFULLY PETITIONS FOR A REHEARING HEREIN ON THE FOLLOWING GROUNDS:

I.

THE OPINION HEREIN IS ERRONEOUS AND CONTRARY TO SETTLED RULES OF APPELLATE PROCEDURE IN REMANDING THIS CAUSE ON A POINT NOT RAISED, PLEADED OR URGED BY APPELLANT IN THE TRIAL COURT OR ON APPEAL.

II.

IT IS UNFAIR TO THE TRIAL COURT AND TO APPELLEE TO REMAND THIS CAUSE ON AN IMAGINARY, NON-EXISTING ISSUE WHOLLY OUTSIDE THE RECORD.

III.

AN APPELLATE COURT MAY REMAND FOR FAILURE TO MAKE A FINDING ONLY WHERE AN ISSUE IS RAISED AS TO WHICH SUCH A FINDING SHOULD BE MADE.

IV.

THE OPINION HEREIN IS CONTRARY TO RULE 52(a) UNDER WHICH THE FINDINGS OF THE DISTRICT COURT MUST BE ACCEPTED BY THE APPELLATE COURT UNLESS SUCH FINDINGS ARE SHOWN BY THE RECORD TO BE "CLEARLY ERRONEOUS."

V.

THE OPINION HEREIN PLACES A STRAINED AND UNREASONABLE CONSTRUCTION ON THE LANHAM ACT.

VI.

THE RECORD HEREIN AFFIRMATIVELY SHOWS THAT THE APPELLEE IS NOT ENGAGED IN "COMMERCE" AND SHE IS ENTITLED TO HAVE THIS CAUSE DETERMINED ON THE RECORD PRESENTED.

VII.

APPELLANTS DO NOT CLAIM THAT APPELLEE'S ACTIVITIES CONSTITUTE OR AFFECT "COMMERCE" AND IN JUSTICE AND FAIRNESS TO HER, AN ORDER SHOULD BE ENTERED HEREIN REQUIRING APPELLANTS TO BEAR THEIR OWN COSTS.

ARGUMENT.

The remand herein was ordered for failure of the Trial Court to make a finding as to whether appellee's activities affected or constituted interstate commerce. No such claim has been made herein by appellants at any time and no such issue was raised or presented in any manner either in the Trial Court or in this Honorable Court. This cause has thus been remanded on a point not raised, claimed, urged or even suggested by appellants.

This decision, if allowed to stand, will open the door to any appellant to urge upon this Honorable Court the remand of a cause on the mere assertion of the existence of some imaginary issue not theretofore raised or presented. This is contrary to settled principles of appellate procedure. The finality of judgments should be encouraged and controversies should be adjudicated *on the record as presented.*

Here, the appellant does not even assert or claim the existence of any issue as to appellee being engaged "in commerce." In this situation, the language of the Supreme Court of the United States in *American P. & Mfg. Co. v. U. S.,* 300 U. S. 457, 81 L. Ed. 751 at 755, is particularly appropriate: "Under these circumstances, we see no reason for remanding the case upon the mere chance that the government may be able to furnish evidence which it has failed to furnish during more than a decade of litigation * * *." The within controversy had its inception four and one-half years ago. [Tr. p. 7, line 7.]

This Honorable Court follows the universal rule that it is only proper to remand for failure to make a finding where there was an *issue raised* as to which a finding

should be made. (*Marlborough Corp. v. U. S.,* 9 Cir., 172 F. 2d 787 at 788.) A trial court is only required to make findings on material issues presented by the pleadings and supported by the evidence. (53 Am. Jur. p. 788, Sec. 1134, n. 5.)

It is fundamental that a record should clearly disclose the basis for an appeal. (*St. Louis & S. F. R. R. Co. v. Willingham,* 8 Cir., 177 F. 2d 167 at 171.) In determining whether findings are "clearly erroneous" within the meaning of Rule 52(a) an appellate court must look to the record as presented. As was said by this Honorable Court in *U. S. v. Jones,* 9 Cir., 176 F. 2d 278 at 285: *From our own analysis of the record we cannot say his (the trial court's) conclusion was 'clearly erroneous.'"** Findings are presumptively correct, and this Honorable Court has held that findings sustained by the evidence must be accepted unless clearly erroneous. (*Ruud v. Amer. Packing Co.,* 9 Cir., 177 F. 2d 538 at 540; *Kaname Fujino v. Clark,* 9 Cir., 172 F. 2d 384 at 385.)

Here the findings are supported by the record as to all issues raised below, and this Honorable Court has gone outside the record to order a remand for failure to find on an issue (possibly non-existent) not raised in any manner at any time. Under the foregoing authorities the District Court's findings should be accepted by this Honorable Court as determinative of this cause. As Chief Judge Denman states in his dissent herein: *"It is a wrong to appellee to manufacture a contention raising an issue with which appellee was not faced below nor is faced here."*

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*All emphasis added.

The Lanham Act Is Inapplicable.

We respectfully disagree with the majority opinion in holding that the Lanham Act gives the District Court jurisdiction if appellee is engaged in commerce. The purpose of this Act was to implement certain international treaties. The majority opinion holds that because none of its provisions appeared in the schedule of repealed laws in connection with the revision of the Judicial Code, said Act confers jurisdiction over this cause, provided appellee's activities affect appellant's interstate commerce. This reasoning is wholly unsound because (1) the Lanham Act must remain in effect to accomplish the purposes for which it was enacted, and (2) in so far as it attempts or purports to cover the field of jurisdiction in the District Courts in simple actions for unfair competition without diversity of citizenship where such actions are not joined with a substantial and related claim under the copyright, patent or trademark laws, it must yield to the new Judicial Code, and to the extent of any repugnancy therewith, it is deemed to be superseded by said Code. (*Cook County National Bank, et al. v. U. S.*, 107 U. S. 445, 2 Sup. Ct. 561, 27 L. Ed. 537 at 539.) This is so, even though there is "no repealing clause to that effect." (50 Am. Jur. p. 559, Sec. 556.) There was no occasion or necessity for listing any provision of the Lanham Act in the schedule of repealed laws. In our view, the construction placed on said Act by this Honorable Court is strained and unrealistic as applied to the facts herein.

The Record Affirmatively Shows That Appellee Is Not Engaged in "Commerce."

Appellee is the owner of five "Stauffer Tables" acquired from appellant B. H. Stauffer in 1941. [Tr. p. 18, lines 12-16.] Said tables were sold, designated and described by said appellant as a "Stauffer Table." [Tr. p. 21, lines 11-12.] Appellee operates and conducts a reducing salon in the area and section of the City of Los Angeles known as Leimert Park, under the name "Sterling Slenderizing System," and in connection therewith uses various types of tables and equipment, including a "Tammen Table," "Multiple Oscillation" equipment and "Stauffer Tables." [Tr. p. 22, lines 3-10.] Commencing on or about the first day of February, 1946, and continuing up to the present time, appellee has not advertised "Stauffer System," nor has she represented nor held herself out to the public by advertising or otherwise as "Stauffer System." [Tr. p. 23, lines 7-12.] Appellee has developed a substantial goodwill in the reducing and slenderizing business in said area and section in the City of Los Angeles known as Leimert Park, and the patronage which she enjoys is due to her own industry, personal efforts and reputation in said community. [Tr. p. 24, lines 19-28.]

The record thus shows that appellee's activities are restricted to operating one reducing salon in the Leimert Park area in Los Angeles, and that during all of the time she has been in business her activities have been limited to that one area. The conduct of this one small business

does not and cannot possibly have any impact on interstate commerce. From these facts in the record the District Court's finding on the issue of appellee's activities in "commerce," if made, would necessarily have been adverse to appellants. Under such circumstances, the cause should not be remanded.

Re Costs.

Appellants, being responsible for the state of the record, should be ordered to pay their own costs. Under the circumstances here existing, it is unfair and inequitable to impose these costs on appellee.

Conclusion.

For the foregoing reasons a rehearing should be granted herein.

Respectfully submitted,

FRANK P. DOHERTY and
FRANK W. DOHERTY,
By FRANK P. DOHERTY,
Attorneys for Appellee.

Certificate of Counsel.

I, Frank P. Doherty, counsel for Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

FRANK P. DOHERTY,
Attorney for Petitioner.